

A brief European overview of restorative justice (RJ) in criminal cases:

Current developments and challenges

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Table of contents

1. European legislative developments on RJ
 - 1.1. Non-binding European policy
 - 1.2. Binding European policy
2. The current image of RJ in Greece and in other European countries
 - 2.1. National evolutions on the legislative level
 - 2.1.1 Legal recognition of RJ and its connection to criminal proceedings
 - 2.1.2 Brief overview of legal recognition of RJ in Greece
 - 2.2. National evolutions in practice
 - 2.2.1. Implementation of VOM as the dominant RJ model in Europe
 - 2.2.2. Implementation of RJ related practices in Greece
3. The future of RJ in Europe: challenges and institutional support
 - 3.1. Conceptualisation issues and legal culture
 - 3.2. Need for the development of a RJ policy

RJ movement in Criminology provides a critical and innovative¹ reflection on the question of justice *in abstracto* and of criminal policies *in concreto*, in order to balance the needs of victims, of offenders and of modern societies. Despite the conceptual influence from abolitionist (prison reform) thinking in criminology², RJ advocates currently seek to collaborate with agencies of conventional justice systems towards a more humane way of dealing with crimes and, thus, the propositions of the RJ movement figure in all international and national agendas oriented towards the modernisation of criminal policies³. In Europe, the emergence of RJ-related legislation and practices (mostly in the form of mediation) started mainly in the 1980s and 1990s, influenced by different perspectives: either with the aim to rehabilitate and to reintegrate the offenders or to strengthen victims' rights and their role in criminal proceedings.⁴

Following the increasing development of RJ theory and practice worldwide, the European Union (EU) and the Council of Europe (CoE) adopted relevant legislative policies over the last twenty years. In 2015, a comparative study on RJ in criminal cases in Europe was published,⁵ drawing on developments the experience of 36 European countries. This study made it clear that the development of RJ on the European continent differs from country to country. Even before binding legal provisions in the EU took effect,⁶ advanced RJ legislation could be found in some European countries, such as the Mediation Act 2006 in Finland, the Municipal Mediation Service Act 1991 in Norway, establishing a National Mediation Service for both civil and criminal cases and the Youth Justice Act 2006 in Belgium, recognising the possibility for both VOM and sentencing circles for juvenile cases. Later, when the abovementioned recommendations from the CoE as well as the binding legal initiatives of the EU took effect, there was a remarkable impact on national legislation. The present article aims to provide an overview of the current image of RJ in Europe and to reflect on some of the challenges regarding its further development.

1. EUROPEAN LEGISLATIVE DEVELOPMENTS ON RJ

1.1. Non-binding European policy

¹ Zehr, H. (1990) *Changing Lenses: Restorative Justice for Our Time*, Heald Press: Scottsdale, PA.

² Christie, N. (1977), "Conflicts as Property", *British Journal of Criminology*, 17:1, 1-15.

³ See for example the United Nations policy on that topic: ECOSOC Resolution 2002/12 entitled "Basic principles on the use of restorative justice programmes in criminal matters". A new Resolution 2016/17 was adopted by ECOSOC in 2016 "Restorative Justice in Criminal Matters", completed by Resolution 27/6 (2018) of the Commission of Crime Prevention and Criminal Justice on RJ. See also UNODC Handbook on Restorative Justice Programmes on 2006, revised in 2020.

⁴ Aertsen, I., Pali, B. (2004) "Victim-Offender Mediation with Serious Offences", in Council of Europe (ed.), *Crime Policy in Europe: Good Practices and Promising Examples*, Council of Europe Publishing: Strasbourg, p.75-86

⁵ Dünkler, F., Grzywa-Holten, J. and Horsfield, P. (2015), *Restorative Justice and Mediation in Penal Matters. A Stock-taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries*, Forum Verlag Godesberg: Mönchengladbach.

⁶ Willemsens, J. (2008) *Restorative Justice: An Agenda for Europe. The Role of the European Union in the Development of Restorative Justice*, European Forum for Restorative Justice: Leuven.

In 1999, the CoE adopted Recommendation No. R (99) 19 on “mediation in penal matters”. This Recommendation was the first official document that guided various countries in Europe to create a legal basis and to develop the practice of VOM in both juvenile and adult criminal justice, concretising basic principles and standards for its implementation. It also suggested the expansion of mediation and other RJ practices (including conferencing) in criminal justice as a generally available services that should be provided at all stages of criminal proceedings.

More recently, the CoE adopted a revised Recommendation CM/Rec (2018)⁸ concerning restorative justice in criminal matters. This document focuses on RJ rather than on mediation and points out that “restorative justice should be a generally available service. The type, seriousness or geographical location of the offence should not, in themselves, and in the absence of other considerations, preclude restorative justice from being offered to victims and offenders” (Basic Principle 18). The Recommendation defines RJ as “any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party. (Rule 3). It notes that this usually takes the form of a dialogue between a victim, offender and other persons who may have been affected by a crime (Rule 4). It also provides and elaborates more detailed basic principles and standards for RJ practices while proposing to implement them not only in criminal cases, but also in the day-to-day work of criminal justice agencies and professionals (rule 57). Thus, it “goes further than the 1999 Recommendation in calling for a broader shift in criminal justice across Europe towards a more restorative culture and approach within criminal justice systems”⁷.

1.2. Binding European policy

In order to support victims’ rights and victim policies in European countries, the EU also promoted mediation in criminal cases with the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings (art. 10). The importance of this binding legal instrument is that it obliged EU Member states to adopt corresponding national legislations. Council Framework Decision 2001/220/JHA was replaced by the famous Victim’s Rights Directive 2012/29/EU of the European Parliament and Council, establishing minimum standards on the rights, support and protection of victims of crime. With this legal document, the EU adopted a more clear and victim-oriented position on RJ. It recognised that RJ is an important means to take into account the needs and the interests of victims as well as to achieve reparation in the aftermath of a crime; it also recognises that important safeguards to prevent secondary and repeated victimisation are required (recital 46).

In particular, the Directive provides a less detailed definition of RJ in comparison with the Recommendation (2018)⁸. In fact, in its Article 2.1.d RJ is defined as “any process whereby the victim and

⁷ Commentary to Recommendation CM/Rec(2018)⁸, p.2.

the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party”. Furthermore, art. 4 lit. j) recognises the victim’s right to receive information “without unnecessary delay, from their first contact with a competent authority” regarding “the available restorative justice services.” In order to prevent victims from “secondary and repeat victimisation, intimidation and retaliation”, Article 12 provides five conditions to safeguard RJ services⁸. In addition, it calls on Member states to “facilitate the referral of cases, as appropriate, to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral”. The Directive also promotes a special training on victims’ needs “for lawyers, prosecutors and judges and for practitioners who provide victim support or restorative justice services” (recital 61).

2. THE CURRENT IMAGE OF RJ IN EUROPEAN COUNTRIES

2.1. National evolutions on the legislative level

Currently, legislation related to RJ exists in almost all European countries. Nevertheless, the legal context and the position of RJ within national legislations differs. There are European countries which have introduced relevant legal provisions in their Criminal Codes (CC) such as Bulgaria and Spain; other countries have introduced RJ in their Codes of Criminal Procedure (CCP), such as Austria, France⁹ and Slovenia. Finally, a third group of countries, e.g. Germany, Belgium, Hungary and Poland, have introduced legal provisions on RJ in both their CC and CCP. In addition, many countries have completed their legal provisions on RJ with other documents, statements of practice and guidance of legal or quasi-legal force, such as circulars (France), departmental circulars (Austria, Finland) or parliamentary resolutions (Poland).

⁸ “(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;
(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

(c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.”

⁹ The French legislator, in particular, has attributed a central and quite symbolic position to RJ within the CCP. In fact, Article 18 of the Law n° 2014-896 of 15 August 2014 on ‘the individualisation of sentences and the strengthening of the efficacy of penal sanctions’ (known also as “Taubira Law”) introduced Article 10-1 entitled “De la justice restaurative” in Subtitle II of the Preliminary Title of the Code. For more details, see Cario R., Sayous B. (2018) “Restorative Justice in France: Some Reflections on its Current Development by the French Institute for Restorative Justice” *The International Journal of Restorative Justice*, 2018 Issue1, p. 122-131.

2.1.1 Legal recognition of RJ and its connection to criminal proceedings

All in all, for achieving reparation and / or reconciliation, national legislation recognises two possible “access points” through which RJ practices can enter into criminal proceedings: either through legal regulations on court diversion, giving the prosecutor a “third option”, or through legal provisions on court mitigation. However, it is important to note that “in the legal sense, reparation and reconciliation, as outcomes, can also be achieved without there necessarily having been a restorative process (like VOM or conferencing¹⁰) involved, as the law makes no such requirements in the majority of cases”¹¹. In fact, in many eastern European countries such as in Greece (*infra*), in Lithuania, in Montenegro, in Serbia and in Slovakia, there are legal provisions for other “reconciliation” processes in which a prosecutor or a judge helps the victim and the offender to reach an informal solution, however “such practices should not be confused with actual VOM, as they lack an important hallmark of VOM – the impartiality of the facilitator”.¹²

Finally, the intervention of RJ practices in criminal proceedings refers to the possibility of restorative outcomes to connect to and to have an effect on the criminal procedure. In other words, to act as a mitigating factor (extenuating circumstances) in sentencing. Thus, in order for RJ to have a real impact on a criminal policy by giving the judge the possibility to refrain from convicting or sentencing, the interference of RJ practices in criminal proceeding is crucial. Whilst the legislative provisions of some countries offer this opportunity, such as in Belgium, in Croatia, in Denmark, in Spain, in Estonia, in the Netherlands, in Portugal, in Finland, in Sweden and in Switzerland, there are countries where this option is not possible or even forbidden. For instance, in France, the circular of 15 March 2017 regarding the implementation of RJ, as a complement to the legal provision of RJ in Article 10-1 of the French CCP, takes a clear position against the interference of RJ in criminal proceedings.

2.1.2 Brief overview of legal recognition of RJ in Greece

In our country, even before the European Directive, dialogue-based processes have been legally recognized in criminal matters. In fact, following the Council Framework Decision 2001/220/JHA, the possibility of penal mediation is available in Greece since 2007 for adult victims and offenders of domestic violence misdemeanours (art. 11-14 of Law 3500/2006 on “Countering domestic violence and other provisions”). In addition, the possibility of a dialogue-based process for juvenile victims and offenders has

¹⁰ Depending on the persons involved, RJ encounters can take several forms, such as: victim-offender mediation (VOM); conferencing; circles (sentencing/peacemaking). The last two forms can include – beyond the victim and the offender as in VOM - family members on both sides (conferencing) or civil society members (circles). The restorative outcome of these encounters may vary: it can rely on a symbolic (e.g., remorse, apologies, community service, etc.) and / or a material basis (e.g. monetary compensation).

¹¹ Dünkler, Grzywa-Holten and Horsfield (2015), p. 1036.

¹² *Ibid*, p. 1036-1037.

been introduced since 2003 in the CC (art. 122 para 1) among the twelve “educational measures” for juvenile offenders under the terminology “reconciliation”. It takes the form of VOM for the “expression of apology” and the “extra-judicial arrangement of the consequences of the offence”. Since 2010, a process of “penal conciliation” can be requested by adult offenders of some non-violent economic crimes (previous art. 308B CCP).

The new CCP (Law 4620/2019) has introduced a new chapter entitled “Penal conciliation and penal negotiation” and recognises the process of “penal conciliation” for the achievement of a “mediation agreement” for economic crimes in all stages before sentencing (art. 301 – 302 CCP). The “penal negotiation” of the art. 303 CCP is close to plea bargain *ratio*. Furthermore, Greece has transported the art. 12 of Directive 2012/29/EU regarding the right to safeguards in the context of restorative justice services (art. 63 Law 4478/2017). It is also important that the art. 104B para 2 of new CC (Law 4619/2019) recognises explicitly the possibility of a restorative process between the victim and the offender in criminal matters as one of the reasons for judicial release.

2.2. National evolutions in practice

National legal recognition of RJ has enormously contributed to the general growth of RJ in practice. RJ is currently more and more accepted by judicial authorities and legal professionals. In addition, it is implemented in more serious cases and / or as an additional tool in conventional justice system. However, the implementation of RJ practices is highly heterogeneous on the European continent. Furthermore, despite the existence of legal provisions on RJ, the use of RJ has still limited impact within the criminal policies of most European countries.¹³

2.2.1. Implementation of VOM as the dominant RJ model in Europe

The most common RJ practice (in the form of encounter) implemented in almost all European countries is victim-offender mediation (VOM).¹⁴ VOM in Europe seems to be implemented mostly based on victims’ perspective and needs. Nevertheless, some other forms of RJ practices (e.g., conferencing) have been reported, but only in thirteen countries, namely in Germany, in England and Wales, in Austria, in Belgium, in Scotland, in Hungary, in Ireland, in Northern Ireland, in Latvia, in Norway, in the Netherlands, in Poland and in Ukraine. Furthermore, VOM is provided as a general service for criminal cases, that is to say at every stage of the criminal proceedings and for all types of offences, only in five European countries, namely in Belgium, in Denmark, in the Netherlands, in Finland and in Sweden. In some countries such as

¹³ Dünkler, Grzywa-Holten and Horsfield (2015), p. 1059-1061.

¹⁴ *Ibid*, p. 1055.

in Austria, in Belgium, in Hungary, in Finland and in Poland there is public funding for RJ practices but this is not the case everywhere in Europe. VOM services are provided nationwide only in several countries (for instance, in Germany, in Austria, in Belgium, in Denmark, in Hungary, in Czech Republic, in Finland, in Poland, etc.), whereas in others VOM services have been established and available only in certain regions of the country (such as in Bulgaria, in Croatia, in Ireland, in Serbia, in Ukraine, etc.). In some countries such as in Germany, in Belgium, in Spain, in Finland, in Norway, in the Netherlands, in Portugal, in Italy etc., there is also the possibility to implement RJ practices after sentencing inside of prisons.¹⁵ Finally, the body referring cases to RJ services also varies in European countries: it can be the police, the public prosecutor or the judge, social services, prison or probation services, or others. To present some examples of this diversity, penal mediation in Belgium can be proposed by the public prosecutor, whereas VOM and other RJ services can be proposed by Probation Services in Austria and the Czech Republic, by local municipalities in Norway, in Finland and in Sweden and by NGOs in France and in Belgium.

2.2.2. Implementation of RJ related practices in Greece

In Greece, recent research¹⁶ has pointed out restorative justice is not currently available across all parts of the country and at all stages of the criminal justice process. In practice, this means that the overwhelming majority of victims and offenders are not taking the information they need to decide whether restorative justice is right for them or not and, therefore, they are excluded from the well-evidenced benefits of participation in restorative practices. Informal reconciliation attempts are already made since the 1990's by police officers and prosecutors for trivial offences in order to avoid the classic criminal procedure but little research has been made on these informal practices¹⁷. Formal dialogue-based and mediation processes are undertaken mostly by the National Center for Social Solidarity (EKKA) and NGO's such as the Hellenic Social Mediation Center and the Hellenic Mediation and Arbitration Center. In 2017, an agreement has been signed between the Youth Court Aid services, the National Center for Public Administration and self-governance (EKDDA) and the Restorative Justice and Mediation Lab of the Panteion University for the special training on RJ of the professionals of the Youth Court Aid services who mostly work with juvenile offenders and are the reference practitioners for the implementation of the "reconciliation" process¹⁸. We

¹⁵ On this topic see also Johnstone, Gerry (2014), *Restorative Justice in Prisons: Methods, Approaches and Effectiveness*, Council of Europe Publishing: Strasbourg.

¹⁶ Giovanoglou, S. (2015). Greece. In: Dünkel, F., Grzywa-Holten, J., Horsfield, P. (Eds.): *Restorative Justice and Mediation in Penal Matters – A stocktaking of legal issues, implementation strategies and outcomes in 36 European countries*. Mönchengladbach: Forum Verlag Godesberg, pp 331-366, Artinopoulou, V. (2013), "Restorative Justice in Greece" in Pitsela, A., Symeonidou-Kastanidou, E., *Restorative Justice in Criminal Matters: Towards a new European Perspective. Comparative Research in 11 European Countries*, Athens, Thessaloniki: Sakkoulas, pp. 101-124

¹⁷ Giovanoglou, S. (2015), p. 358, Artinopoulou, V. (2013), p. 115

¹⁸ Πανάγος Κ. (2017), «Συνδιαλλαγή δράστη και θύματος στο ποινικό δίκαιο των ανηλίκων. Η αναγκαιότητα εκπόνησης ενός διαδικαστικού πλαισίου», *Ποινική Δικαιοσύνη*, τ. 8-9, σ. 728 επ., Πανάγος Κ. (2012), «Ο ρόλος του επιμελητή ανηλίκων στη συνδιαλλαγή ανήλικου δράστη και θύματος», *Νέοι Έγκλημα και Κοινωνία*, τ. 6, σ. 55 επ.

also note that the implementation of the “educational measures” (*supra*) in which also figures the “reconciliation” process between juvenile offenders and victims are also coordinated and implemented by the “Central Scientific Council for the prevention and the confrontation of the victimization and the criminality of juveniles” (KESATHEA) which was established by the Law 3860/2010.

Nevertheless, despite the above mentioned positive and encouraging achievements and developments, in practice, when reconciliation processes and VOM take place legal professionals and prosecutors undertake a central role in reconciliation, whereas they do not always have the necessary knowledge on restorative philosophy and practices¹⁹.

3. THE FUTURE OF RJ IN EUROPE: CHALLENGES AND INSTITUTIONAL SUPPORT

3.1. Conceptualisation issues and legal culture

Both research and practice demonstrate that RJ has a valuable potential for criminal policies, offering new opportunities and opening up new directions. However, in order to achieve a real reform in criminal justice systems and to not leave the potential of RJ underdeveloped, European policy makers, criminal justice agencies, legal professionals and researchers should deal with challenges and critical issues. Its international character and the intrinsic values of RJ have made it an attractive concept and practice worldwide, whilst its concrete definition remains a challenge for scholars and practitioners. RJ basic literature has been elaborated mostly by academics and scholars from the common law legal culture which differs from the legal tradition of the Romano-Germanic heritage, known also as civil law legal culture (mostly in continental Europe). The fundamental difference lies in the importance given to written law (prevalence of the principle of legality) by the jurists of the civil law legal culture;²⁰ the positivist tradition of the Romano-Germanic legal heritage makes judicial proceedings of civil law legal culture less flexible and, thus, more bureaucratic. This makes conceptualisation and implementation of RJ more difficult.

Whilst in some places in Europe such as in Belgium and in the northern European countries professionals of criminal justice (judges, lawyers, police officers etc.) seem to be positive towards RJ,²¹ the

¹⁹ Wasileski, G. (2015), “Prosecutors and Use of Restorative Justice in Courts: Greek Case”, *Journal of Interpersonal Violence* 32(13). Retrieved from:

https://www.researchgate.net/publication/278789090_Prosecutors_and_Use_of_Restorative_Justice_in_Courts_Greek_Case

²⁰ Cuniberti, Gilles (2014), “Les caractéristiques prêtées classiquement à la tradition juridique continentale”, *Revue de l'ERSUMA*, available at <<http://revue.ersuma.org/no-special-idef-mars-2014/evaluation-du-droit-civil-et-du/article/les-caracteristiques-pretees>>.

²¹ Vanfraechem, Inge, Ivo Aertsen and Jolien Willemsens (2010) *Restorative Justice Realities. Empirical Research in a European Context*, Eleven International Publishing: The Hague, p. 77

establishment of a legal base for RJ has also provoked reactions,²² distrust and several questions to legal professionals in other European countries; especially the connection of RJ principles to principles of criminal proceedings such as the presumption of innocence, the right to a fair trial, the principle *ne bis in idem*, the principle of proportionality, etc. Therefore, despite the institutionalisation of RJ and the implementation of various relevant programs, RJ in Europe is not used to its full potential.²³ RJ in Europe is mostly associated with VOM whereas other RJ practices that involve family or civil society members (conferencing, circles) are not widely practiced. In addition, on the European continent RJ is not available for all offenders and victims or it is used mainly or exclusively for minor offences. This is partly due to the strong connection of its institutionalisation to the bureaucratic nature and the legal culture of our criminal systems, as mentioned above. Thus, new legal knowledge, adapted to European legal cultures has to be developed²⁴ and basic academic education and research on RJ - especially in the European Law faculties - is needed.

It worth mentioning that the last few years in Greece there is a remarkable development of academic research on RJ within “the wider context of new criminological approaches”²⁵. The country has already participated in international RJ projects, funded by the EU such as the AGIS Project of the European Forum for Restorative Justice (EFRJ)²⁶. In addition, during 2011-2013 the Aristotle University of Thessaloniki (AUTH) was the leading partner of the “The 3E Model for a Restorative Justice Strategy in Europe: The Geographic Distribution of Restorative Justice in 11 European Countries and the Configuration of an Effective – Economic – European Strategy Model for its further Diffusion” aiming both at the experience exchange among the countries and at the development of a strategy for the development of RJ.²⁷ Finally, our country represented by the AUTH and the National School of Magistrates is currently participating in the RE-JUSTICE project (2019-2021). The aim of this EU funded initiative is to promote and to raise awareness on RJ within the judiciary, through training, building knowledge and developing skills and attitudes on RJ for judges and public prosecutors. The RE-JUSTICE project is currently developed with the collaboration of three European countries (Greece, Spain and Italy) and, ultimately, the same process will be also promoted in other EU Member States.

²² This is the case in France, for instance. See Rabut-Bonaldi Gaëlle (2015), «La mesure de justice restaurative, ou les mystères d'une voie procédurale parallèle », *Recueil Dalloz*, p.97.

²³ Dünkel, Grzywa-Holten and Horsfield (2015), p. 1064.

²⁴ As it has been pointed out “the literature of restorativism needs not yet greater enthusiasm but more reflection”, Von Hirsch, Andrew (1998), “Penal Theories” in Michael Tonry (ed.) *The Handbook of Crime and Punishment*, Oxford University Press: New York and Oxford, 659-682.

²⁵ Giovanoglou, S. (2015), p. 362

²⁶ Papadopoulou, P., Panagiotopoulos P. (2008), “Greece” In Casado Coronas, C. *alii*, Restorative justice: an agenda for Europe Supporting the implementation of restorative justice in the South of Europe, Final report of AGIS Project JLS/2006/AGIS/147, Leuven: European Forum for Restorative Justice, pp. 10-15

²⁷ Pitsela, A., Symeonidou-Kastanidou, E. (2013), *Restorative Justice in Criminal Matters: Towards a new European Perspective. Comparative Research in 11 European Countries*, Athens, Thessaloniki: Sakkoulas

3.2. Need for the development of a RJ policy

The development of RJ policy depends, *inter alia*, on the political, economic, cultural and legal background of a country. However, one of the most important difficulties for the implementation and the development of RJ practices in many European countries is the lack of central, state funding.²⁸ In addition, despite the fact that there is some important and encouraging qualitative research being done regarding the effectiveness of RJ worldwide, there is little or fragmented data from quantitative research²⁹ which complicates our image of what and how RJ is applied, especially in Europe. In fact, the RJ movement has to deepen, to improve and to intensify empirical research because the role of evidence-based policy is of vital importance for the promotion of RJ. Accordingly, public awareness on RJ and the possibility for European citizens to have access to it, is also very important: “Politicians are unlikely to promote RJ if there is no public demand for it.”³⁰

Finally, in order to support the development of a RJ policy in Europe, the EFRJ has established and coordinates since 2018 the European Restorative Justice Policy Network (ERJPN), which consists of representatives of the Ministries of Justice and policy makers from various European countries. The ERJPN meets once a year³¹ to raise awareness and to inform the representatives of the countries on RJ developments and research findings in order to support and to better organize the implementation of RJ policies in the participating countries.

²⁸ The lack of funding is one of the reasons why the offer of RJ services is sporadic in some countries.

²⁹ Dünkel, Grzywa-Holten and Horsfield (2015), p. 1059.

³⁰ *Ibid*, p.1077.

³¹ Until now, Greece has been represented only in the first meeting of the ERJPN by Sophia Giovanoglou.